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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES OF AMERICA, Petitioner, v. THEODORE MICHEL, Respondent.	Nos. ~~812-813~~ 79+80
UNITED STATES OF AMERICA, Petitioner, v. LOUIS KRIEGER, Respondent.	

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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Statement.

The Attorney General petitions for writs of certiorari from judgments of the Circuit Court of Appeals for the Second Circuit reversing the District Court and holding that the actions were not barred by the statute of limitations.

These are suits to recover income taxes erroneously collected for 1919. The taxes were paid more than five years before suit was brought. Refund claims were timely filed.

By letter dated August 17, 1925, the Commissioner notified respondent Michel that his claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him. Respondent Michel heard no more concerning the action on his claim until he received a letter from the Commissioner dated June 27, 1928, notifying him that the claim had been rejected on September 2, 1925. By letter dated April 2, 1925, the Commissioner notified respondent Krieger that his claim would be rejected and the rejection would officially appear on the next schedule to be approved by him. Respondent Krieger heard no more concerning the action on his claim until he received a letter from the Commissioner dated June 27, 1928, notifying him that the claim had been rejected on April 20, 1925.

The District Court in each case dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and entered judgment accordingly. The Court rendered no opinion.

The Circuit Court of Appeals reversed these judgments, holding that, since no notice of rejection had been mailed after the rejection, as required by Section 3226, Revised Statutes, as amended, or until June 27, 1928, more than two years after the date of rejection relied upon by petitioner, no statute of limitations had run on the bringing of suit in these cases at the time they were begun in September, 1928. The opinion of the Circuit Court of Appeals is reported in 37 Fed. (2nd) 38.

Question Presented.

Can the Government be heard to urge the defense of the statute of limitations in a suit to recover taxes brought more than two years after the rejection of a claim for refund, where the Commissioner of Internal Revenue failed to notify the taxpayer of such rejection by mail, as required by Section 3226 of the Revised Statutes, as amended, or until more than two years after such rejection had expired?

Statute Involved.

The statutory provisions involved have been correctly and fully quoted by the Attorney General in his brief. The pertinent part of Section 3226 of the Revised Statutes, as amended by Section 1014, Revenue Act of 1924, and re-enacted by Section 1113, Revenue Act of 1926, reads:

> "No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Argument.

The question in each case is the effect of the provision constituting the last sentence of Section 3226 of the Revised Statutes, as amended, that the Commissioner shall, within ninety days *after* the disallowance of any claim for refund, notify the taxpayer thereof by mail. The Circuit Court of Appeals for the Second Circuit has held that this provision was mandatory, and that, where it was not complied with within two years, the statutory provision limiting the time for bringing suits to two years after the rejection of claims for refund did not bar the suits.

It is certainly reasonable that a taxpayer should be advised of a date which marks the beginning of the running of a statutory period of limitation which may be used against him. Congress evidently considered it necessary for his protection that he be so advised within a reasonable length of time, which it fixed at ninety days after the occurrence of the date.

It is difficult to conceive a purpose for the insertion of the provision other than the protection of the taxpayer's rights. It was of so little importance to the executive officials in the administration of the tax laws that, as the Attorney General has stated in his petitions for certiorari in the instant cases (p. 4), the Treasury Department has disregarded it in thousands of cases. It was not designed for the convenience of administrative officials or to secure order, system or dispatch in proceedings. Its observance would have accomplished none of these things. Its sole purpose was to advise taxpayers when their actions would become barred.

The rule in such cases was stated by this Court, in an opinion rendered by Mr. Justice Field in *French* v. *Edwards*, 13 Wall. 506, 511, to be that such a provision, enacted for the protection of citizens, is *mandatory*. This Court said:

> "But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

The position of the Attorney General must necessarily be that the Commissioner of Internal Revenue can disregard this statutory mandate at will, and yet take advantage of the statute of limitations as if he had complied with it.

There is a fundamental rule of law that where a statute, by a mandatory provision, requires the giving of notice, compliance with such provision in all essential particulars is a condition precedent to any further proceedings. In *Cooley on Taxation*, Third Edition, pages 484, 485, it is said:

> "So all the provisions designed to give him (the taxpayer) the opportunity of a review of the assess-

> ment, whether by the assessors themselves, or on appeal from their conclusions, are exclusively in his interest. Every notice which the statute provides for that end, whether by publication or otherwise, must be given with scrupulous observance of all its requisites. The notice cannot be shortened a single day without rendering it ineffectual; the presumption being that the law has made it as short as was deemed consistent with due protection. A published notice cannot be received as the substitute for a notice to be personally delivered to the party concerned, and where the notice is to be given personally and also by publication, a failure in either is fatal."

We submit that the Commissioner, having failed to give the notice to the taxpayers of the dates of rejection of their claims for refund, cannot now set up the statute of limitations to the taxpayers' prejudice.

This Court recently had before it another instance of disregard by the Commissioner of Internal Revenue of a mandatory provision of law. The Commissioner collected taxes after the time prescribed for their collection, and in this he was protected by Section 3224 of the Revised Statutes, which prohibited a suit to enjoin the collection of taxes under any circumstances. But when he refused to refund the taxes thus illegally collected, on the ground that they were the correct taxes due, and should be retained even though the collection was made in an illegal and prohibited manner, this Court refused to sustain him, and gave judgment for their repayment to the taxpayers. The violation by the Commissioner of the provision limiting the period for collection prevented all further proceedings by him, including a defense on the ground of the correctness of the taxes collected, where the taxpayer brought suit for their recovery on the sole ground of illegality in their collection (*Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346; *Toxaway Mills* v. *U. S.*, 273 U. S. 781). The question at issue in that case also involved thousands of similar claims aggregating many

millions of dollars, but this Court did not let that consideration influence it to approve wholesale violation of a statutory provision by the administrative officials to the prejudice of taxpayers' rights.

The Attorney General relies on the fact that some time before the actual rejection of the claims for refund the Commissioner notified the taxpayers that their claims would be rejected, and that the rejection would officially appear on the next schedule to be signed by the Commissioner. He says:

> "They had therefore actual notice that their claims would be denied and the general object intended by the notice provision of the statute was secured."

They had, however, no actual notice of the rejection, or the date thereof, but only of the Commissioner's intention, which was subject to change at any time up to the rendering of his official decision. Notice of his intention did not secure the object of the notice provision, which was to advise taxpayers when the statutory period of limitation began to run. The statute provided that the notice should be given *after* the rejection when the exact date of the rejection would be definitely known. Even at the time this notice provision was first enacted it was the custom of the Commissioner to advise taxpayers of his intention to reject their claims before he actually rejected them. It is hardly likely that Congress intended to instruct him to do something that he was already in the habit of doing. The fact that this custom was in vogue at the time the provision for notice was enacted shows that Congress was not satisfied with it, and required something more for the protection of taxpayers.

The notice required by the statute was the only means by which taxpayers could learn the dates upon which their claims were rejected and the limitation period began to run. The schedule of rejected claims, the signing of which by the Commissioner constitutes his official act of decision

on and rejection of the claims, is an interdepartmental document not furnished to or available to the taxpayer.

The notices of intention to reject the taxpayers' claims did not constitute actual notice of their rejection, for the claims had not yet been rejected. As stated by the Attorney General in his petition, the notices of intention to reject were dated August 17, 1925, in the Michel case and April 2, 1925, in the Krieger case. The actual rejections were on September 2, 1925, and April 20, 1925. The only notices of rejection, stating the dates thereof, were given on June 27, 1928, more than two years after the rejection dates.

The time for bringing suit does not run from the Commissioner's notice of intention to reject a claim at a future date. The statute says "within two years after the disallowance." The Attorney General agrees that "the disallowance of a claim for refund takes place when the schedule is approved by the Commissioner" (Brief, p. 9), and the Commissioner himself says in his letters of June 27, 1928, that the disallowances occurred on September 2, 1925, and April 20, 1925, respectively, and not on August 17, 1925, and April 2, 1925, the dates of the letters stating his intention to reject at a future time.

As stated by the Circuit Court of Appeals, the notices of intention to reject were not rejections or final decisions on the claims. At any time up to the date of signing the schedule in such cases he might change his intention, due to some new Court decision, Board of Tax Appeals decision, or change in his own interpretation of the law or facts. He might not agree with the conclusion reached by his subordinates, who in all cases sent out the notice of intention letter, and who could not themselves reject a claim, but merely recommend to him that he reject it. It has happened in many cases that letters of intention to reject were mailed, but that the claims were never rejected. It has also happened in many cases that the Commissioner has reconsidered his intention to reject and later arrived at the same conclusion, but such reconsideration has postponed the date of rejection.

Recapitulation.

The claims for refund were rejected more than two years before these actions were commenced, but the notice of rejection required by law, and necessary to render the statute of limitations an available defense, were not given until just before these actions were begun. These actions were therefore not barred. It is not necessary to decide what would be the effect of a notice, given after the statutory ninety days, but before the expiration of the two-year period. In the instant cases the notices were not given until the two-year period had expired. Respondents were certainly entitled to notice of the date on which the two-year period would expire in time to enable them to bring their actions before that date. The Commissioner failed to take one of the steps required by law to foreclose respondents from bringing their actions more than two years after the rejection of their claims.

Reasons Why the Writs Should Be Denied.

1. The provision for notice is obviously mandatory.

2. The provision for notice is clear and unambiguous.

3. Even though the decision of the Circuit Court of Appeals is far-reaching and affects many cases, it merely follows the plain words and intention of the statute and insists upon compliance therewith.

4. It is urged on behalf of the writ that the construction of the statute by the Court below, if sustained, would result in the reopening of many claims involving two billions of dollars. That argument is not addressed to the question of the proper construction of the statute, but as to the practical operation of the proper construction and the argument should be made to the Congress and not to the Court.

5. There is no conflict of decisions on the question involved. The question of required notice of rejection was considered in only one case cited by the Attorney General, and in that case the decision was in favor of the taxpayer (*Mahoning Coal R. Co.* v. *United States* [N. D. Ohio], 28 Fed. [2nd] 917). The Government took no appeal in that case.

Neither the District Court, in dismissing the complaints, nor the dissenting judge in the Circuit Court of Appeals, rendered any opinion.

6. The fact that this point has not been raised or argued in any other case, save the one above mentioned, indicates that it is not so important as the Attorney General states, and that it probably does not affect many cases or cases involving the possibility of large refunds. As to this, however, respondents have no definite information.

Conclusion.

It is respectfuly submitted that the petition for writs of certiorari should be denied.

Respectfully,

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